



USAID | **AFGHANISTAN**
FROM THE AMERICAN PEOPLE

LAND REFORM IN AFGHANISTAN (LARA)

DESIGNING A LEGAL FRAMEWORK FOR URBAN PLANNING IN AFGHANISTAN: GUIDANCE REPORT



October 2012

This publication was produced for review by the United States Agency for International Development. It was prepared by Tetra Tech ARD.

This report was prepared for the United States Agency for International Development under Contract No. 306-C-00-11-00514-00, Land Reform in Afghanistan.

Principal Contacts: Nigel Thomson
Senior Technical Advisor/Manager
ARD, Inc.
Burlington, VT
Tel. +1 802 658-3890
Nigel.Thomson@tetrattech.com

Kelly Kimball
Project Manager
ARD, Inc.
Burlington, VT
Tel. +1 802 658-3890
Kelly.kimball@tetrattech.com

Stephen Terravecchia
Chief of Party
ARD, Inc.
Kabul, Afghanistan
Tel. +93(0) 795-739-586
Stephen.Terravecchia@tetrattech.com

Implemented by:
Tetra Tech ARD
159 Bank Street, Suite 300
Burlington, Vermont
ard@tetrattech.com

Cover Photo: Community discussion on upgrading process of the informal settlements in Araban of Jalalabad city in September 2012.



LAND REFORM IN AFGHANISTAN (LARA)

DESIGNING A LEGAL FRAMEWORK FOR URBAN PLANNING IN AFGHANISTAN: GUIDANCE REPORT

OCTOBER 2012

By Yohannes Gebremedhin
Legal Consultant

DISCLAIMER

The author's views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government.

TABLE OF CONTENTS

Acronyms and Abbreviations	ii
PREFACE	iii
EXECUTIVE SUMMARY	iv
ACKNOWLEDGEMENTS	vi
1.0 INTRODUCTION	1
2.0 legal and policy frameworks for urban planning	2
2.1 LEGAL FRAMEWORK	2
2.2 POLICY FRAMEWORK	7
3.0 GUIDING PRINCIPLES FOR DEVELOPING AN URBAN PLANNING LAW ...	9
3.1 ESTABLISH A TRANSPARENT AND PARTICIPATORY SYSTEM.....	9
3.2 ESTABLISH A SUSTAINABLE PLANNING SYSTEM	10
3.3 ESTABLISH A CONSISTENT SYSTEM	10
4.0 urban planning related legal issues: Suggested guidelines.....	11
4.1 POSSIBLE IMMEDIATE ACTIONS	11
4.2 ENABLING LEGISLATION FOR QUICK URBAN DEVELOPMENT SCHEMES.....	14
4.3 MINIMAL PLANNING STANDARDS FOR INFORMAL SETTLEMENTS	16
5.0 KEY SUBSTANTIVE LEGAL ISSUES: SUGGESTED GUIDelines	19
5.1 OBJECTIVES OF URBAN PLANNING LAW.....	19
5.2 INSTITUTIONAL ARRANGEMENT FOR URBAN PLANNING.....	19
5.3 TYPES OF DEVELOPMENT PLAN	21
5.4 PROCEDURE FOR PREPARING DEVELOPMENT PLANS.....	22
5.5 REVISING DEVELOPMENT PLANS	22
6.0 CONCLUSIONS	24
7.0 REFERENCES	26

ACRONYMS AND ABBREVIATIONS

ARAZI	Afghanistan Land Authority
GIRoA	Government Islamic Republic of Afghanistan
KURP	Kabul Urban Reconstruction Project
KCI	Kabul City Initiative
IDLG	Independent Directorate of Local Governance
LARA	Land Reform in Afghanistan
LTERA	Land Tenure and Economic Restructuring in Afghanistan
MAIL	Ministry of Agriculture, Irrigation, and Livestock
MUDA	Ministry of Urban Development Affairs
PAPs	Project Affected Persons
USAID	United States Agency for International Development
World Bank	International Bank for Reconstruction and Development

PREFACE

The United States Agency for International Development (USAID) Land Reform in Afghanistan Project (LARA Project) is managed by Tetra Tech ARD under USAID Contract No. 306-C-00-11-00514-00, with implementation assistance from its partners Tetra Tech DPK, International Land Systems (ILS), Development & Training Services Inc (dTS), and Landesa (formerly the Rural Development Institute). LARA project's primary government partners are Arazi (formerly the Afghan Land Agency), the Ministry of Urban Development Affairs (MUDA), the Independent Directorate of Local Governance (IDLG), AGCHO, as well as the Supreme Court and the Municipality of Jalalabad.

The purpose of the LARA project is to develop a robust, enduring, and Afghan-owned and-managed land market framework that encourages investment and productivity growth, resolves/mitigates land-based conflict, and builds confidence in government's legitimacy, thereby enhancing stability in Afghan society. The Project continues USAID/Afghanistan's support for land reform and land rights strengthening that began through the earlier LTERA Project.

The LARA project is designed to contribute to USAID's AO and Afghanistan National Development Strategy. Three influences will help shape The LARA project's contributions to this Objective: (1) the foundations provided by the former USAID Land Tenure and Economic Restructuring in Afghanistan (LTERA) project that provides a starting point and methods that can be adapted; (2) USAID/Afghanistan management objectives including Afghanization and conflict mitigation; and (3) the following major LARA project objectives:

- Improve property rights delivery (land administration and formalization);
- Enable all citizens (women, minorities, and vulnerable populations) to exercise their rights through public information awareness (PIA);
- Strengthen land dispute resolution processes to reduce conflict and promote peace and stability;
- Promote economic development through clear and enforceable property rights, PIA, land rights delivery, and land dispute resolution; and
- Strengthen institutional, policy, and legal reform to secure property rights for Afghan citizens;
- Provide assistance in the cross-cutting areas of gender, training, PIA, and private sector development.

These objectives are supported by the following three components that provide the over-arching structure for programming activities and tasks in the work plan:

1. **“Informal Settlements & Formalization”** - Support MUDA, AGCHO, IDLG, and the Municipality of Jalalabad with informal settlements upgrading, formalization, cadastral mapping, laws for urban planning and land use regulation, and training in planning and enforcement. Also, strengthen tenure security by supporting the Supreme Court and communities with rights formalization and informal dispute resolution.
2. **“Legal Framework”** - Provide limited assistance to Arazi to identify, manage, lease, and obtain revenue from Afghan government lands and provide targeted technical assistance.
3. **“Capacity Building”** - Build capacity of public (AGCHO, Arazi, IDLG, MUDA, Supreme Court) and private sector service providers to improve and streamline land tenure processes to Afghan private and public sectors.

EXECUTIVE SUMMARY

The purpose of this report, in accordance with the Consultant's Terms of Reference, is to provide clear directions on how to move forward to revise or prepare new draft urban planning legislation. It also aims at providing discussions and analysis on key issues and principles related to urban planning law, which would form the main pillars of the proposed legal framework. In other words, the report gives analysis of the legislative aspects of urban planning in the country, and a plan of action or recommendation on the way forward in terms of putting an appropriate legal framework in place.

This work took place over the course of four weeks. As indicated in the Consultant's inception report, this report expands and builds upon the "Recommendations Report" – entitled "The Legal Aspects of Urban Planning in Afghanistan" – that the Consultant recently prepared on the same subject. In preparing the Report, the Consultant has examined and analyzed available literature on urban planning and land management including studies and reports. The Consultant has also examined pertinent legislation, insofar as they relate to urban planning. The role and function of pertinent public entities have also been examined in detail by the Consultant.

Furthermore, the Consultant participated in a number of meetings with MUDA staff and other pertinent officials and professionals, to discuss the findings and recommendations contained in the Recommendations Report, and to consider various options in the development of a suitable urban planning law. At the end of his mission the Consultant met with a small technical group to discuss the main findings and recommendations contained in the first draft and other outstanding issues.

Section 1 provides an introduction to the objectives and scope of this segment of the Consultant's short-term assignment. It also provides the methodology followed in preparing this report.

Section 2 describes and analyzes the legal and policy frameworks for urban planning in Afghanistan. The current legal framework for urban planning in Afghanistan consists of a number of pieces of legislation, which were issued at different levels of the country's hierarchy of laws. The revision and consolidation of these pieces of legislation is warranted as many provisions contained in these pieces of legislation have become obsolete and inoperative. Urban planning functions are allocated amongst several agencies in an ambiguous and vague manner making it impractical for a coordinated urban planning in the country. The procedures for preparing, approving and revising development plans are not sufficiently defined. Enforcement of development plans and developments that do not conform to plans are not dealt with by the laws either.

Section 2 analyzes the main pillar of the legal framework for urban planning, which is the *Law on Municipalities 2000*. A number of other pieces of legislation directly or indirectly affecting urban planning are also discussed and analyzed in the report. These pieces of legislation include: the *Expropriation Law 2000*, *Regulations on Urban Settlement Projects July 1979*; *Regulation for Sale and Distribution of Governmental Residential Apartments and Land in Kabul City*, October 1980; *Regulation on the implementation of the Master Plan*, December 1990; and *Order for Banning the Distribution of State Owned Land in Violation of City Master Plan 2002*.

With respect to urban planning, the National Land Policy (NLP) of Afghanistan has adopted challenging and transformative policy approaches that recognize the needs of the urban majority and the importance of putting the rule of law at the forefront of any strategy for the development of the urban sector. In consideration of the later interest, the NLP promotes the principle that all land development must be

carried out in accordance with plans designed by competent authorities. At the same time, however, to cater to the needs of the urban majority, the NLP adopts the concept of “upgrading” as a transformation tool in dealing with informal settlements. The parts of the NLP that are relevant to urban planning are broad statements of general principles. These broad general principles were meant by the drafters of the Land Policy to serve as precursor to more detailed policy guidance on specific aspects of urban planning.

Section 3 of the report suggests guiding principles for developing an appropriate legal framework for urban planning in Afghanistan. The suggested guiding principles aim at addressing the key institutional and legislative issues that have been impeding the preparation and implementation of development plans in urban areas. There are good indications that MUDA has been striving to move away from the physical planning approach to an integrated and strategic urban planning approach. Therefore, the guiding principles are suggested with the objective of developing an urban planning law that would promote an integrated and strategic urban planning system and also prepared in a manner that it would be relevant in terms of appropriately governing the key issues of urban planning in the country.

The suggested guiding principles relate to establishing a transparent and participatory system; establishing a sustainable planning system; and establishing a Consistent System to Ensure a Uniform Approach to Planning.

Section 4 provides practical guidelines in relation to urban planning and legislative issues. Thus far the Government has resorted to an *ad hoc* and fire-fighting approach to resolving the outstanding institutional and legal problems surrounding urban planning in Afghanistan. Almost all the measures have focused on institutional problems. There have been a series of administrative measures taken to resolve the overlapping functions between different institutions in respect of urban planning. However, the Government has not yet succeeded to effectively resolve the outstanding institutional issue through such partial and ad hoc administrative measures, which took the form of memoranda of understanding between relevant institutions and Council of Ministers resolutions.

Beyond such efforts, the government has yet to institute a coherent and comprehensive strategy to deal with urban planning related issues. Efforts geared towards a comprehensive and coherent strategy are required. However, such an objective would require substantial legal changes. This report, therefore, attempts to provide practical guidelines for adopting an approach that potentially has a good chance of being implemented in a phased manner, in the context of existing institutions, and by building on existing relevant laws and practices.

The existing legal framework – as it stands now – represents a bundle of impediments that must be overcome, if the design of an efficient urban planning system in the country is to materialize successfully. The solution to the bundle of impediments can be found through a rigorous analysis of the many important issues and legal provisions that are embodied in a number of legislation that are relevant for urban planning in Afghanistan. Section 5 provides an analysis of the key issues pertaining to urban planning in Afghanistan and gives recommendations on how to deal with them.

An earlier report on the legal aspects of urban planning in Afghanistan (*The Legal Aspects of Urban Planning in Afghanistan “Recommendations Report”*) prepared by the Consultant under the same contract provides a legal analysis. Section 5 of this report is liberally borrowed and adapted from the Recommendations Report on the legal aspects of urban planning in Afghanistan prepared by the Consultant under the same contract to provide drafting guidelines on key substantive issues. It is upon this substantive legal analysis, and further analysis of related policy issues, that the practical guidance on urban planning and outstanding legislative issues developed in section 4, and the guiding principles for developing urban planning law set forth in section 3, are based.

Section 6 summarizes the main conclusions and recommendations of the report that deserve priority attention.

ACKNOWLEDGEMENTS

The Consultant was assisted immensely by many persons in Afghanistan, both within the project and outside. The Consultant would like to express his indebtedness to Ms Anna Soave for integrating him thoroughly into the day-to-day work of her Component of the LARA project and for the extraordinary assistance she provided at all times. Ms. Soave devoted a great deal of time explaining the implementation effort of the project and organizing meetings with institutional counterparts and other professionals from non-governmental entities and reviewing the Consultant's draft reports. She also provided the Consultant useful materials. Ms. Soave's Component 1 members especially Engineer Mohammad Rafi Ahadi and Mr Zahirshah Zadran were also extremely important to the conduct of this consultancy, and the consultant is especially grateful for their help. The consultant would also like to thank the Legal Team staff of LARA. In particular, Mr. Arif provided insightful assistance.

Special thanks are due to Engineer Ahmad Shah Hemat, Director of Urban Development Affairs, MUDA, for the warm hospitality and extraordinary willingness for collaborative effort and for crucial assistance that he provided throughout the Consultant's stay in Kabul. Engineer Hemat dedicated a great deal of time to update the consultant on the urban planning reality on the ground. The consultant is also grateful for the insightful and enthusiastic assistance provided by Mr. Abdul Baqi "Popal", General Director of GDMA/IDLG.

Special thanks are also due to His Excellency Engineer Mohammad Yusuf Pashtun for his warm hospitality and invaluable assistance. Engineer Pashtun did not only provide extremely useful insights into the Afghan urban reality but also devoted his time and energy first to facilitate a meeting between the consultant and the Head of GDMA and then subsequently to arrange a technical consultative meeting with ten renowned relevant officials and urban planners. I am indebted to Dr. Hashimzai, Senior Adviser, Ministry of Justice, for providing insightful assistance on legislative issues in the country and for his warm hospitality and encouragement. In spite of a forbidding factor of unique nature, Engineer Wahid Abdul Ahad, the Deputy Mayor of Kabul, was able to find ways and means to extend his warm hospitality and friendly assistance. My interaction with Engineer Ahad was extremely valuable in terms of understanding ground-level realities in the field.

The Consultant would also like to express his gratitude to Mr. Justin T. Holl, Jr., with whom it was a tremendous professional privilege and personal pleasure to work. Mr. Holl unreservedly and generously shared his views and experiences on common professional matters and also reviewed the Consultant's draft report. Finally, the consultant would like to thank Engineer Yasin Safar Mr. Saed Mohsen Banouri for providing extremely useful insights into the Afghan urban reality and for devoting many days of their time to assist the consultant in various ways.

1.0 INTRODUCTION

In accordance with the Consultant's Scope of Work and Inception Report, this report will aim at providing clear directions on how to move forward to revise or prepare a new draft urban planning legislation, as the case may be. It also aims at providing discussions and analysis on key issues and principles related to urban planning law, which would form the main pillars of the proposed legal framework. In other words, the report gives analysis of the legislative aspects of urban planning in the country, and a plan of action or recommendations on the way forward in terms of putting an appropriate legal framework in place. As indicated in the inception report, this report expands and builds upon the "Recommendations Report" that the Consultant recently prepared on the same subject.

As implied above, this report is prepared as a contribution to the development of an urban planning law for Afghanistan. It does not aim at *preparing* a draft urban planning law but, rather, aims to *suggest a set of general principles and guidelines* which can be drawn on by the pertinent government authorities when they decide to draft an urban planning law as they deem it necessary and desirable for the establishment of a suitable and efficient urban planning system. This report draws on the practical experiences of the pertinent urban planning authorities in Afghanistan, the existing legal framework for urban planning, and comparative experiences from the Consultant's experiences of drafting urban planning laws and studies of the development of statutory urban planning laws in other comparable jurisdictions.

This report was prepared over a period of four weeks in September and October 2012 by the Legal Consultant contracted by LARA/USAID as part of the broader effort to strengthen and support the Government of the Islamic Republic of Afghanistan institutions dealing with land. The Report is prepared pursuant to the description of Deliverable # 4 provided by the Consultant's Scope of Work. In accordance with the Consultant's Scope of Work, the purpose of this report is to provide clear directions on proposed legal amendments required to improve the existing urban legal framework.

In preparing the Report, the Consultant has examined and analyzed available literature on urban planning and land management including studies and reports. The Consultant has also examined pertinent legislation, insofar as they relate to urban planning. The role and function of pertinent public entities have also been examined in detail by the Consultant.

Furthermore, the Consultant held a number of consultative meetings with MUDA and IDLG/GDMA senior officials and other pertinent professionals, to discuss the findings and recommendations contained in the first report, and to consider various options in the development of a suitable urban planning law. At the end of his mission the Consultant met with an *ad hoc* Technical Group to discuss the main findings and recommendations contained in the first draft and other outstanding issues. This important consultative meeting with the *ad hoc* Technical Group was facilitated by Engineer Pashtun, Senior Technical Adviser to the President. The participants in this meeting included the Senior Technical Adviser to the President, the General Director of IDLG/GDMA, senior technical advisers from MUDA, senior officials and advisers of Dehsabz-Barikab City Development Authority (DCDA) officials, and other renowned urban planners.

2.0 LEGAL AND POLICY FRAMEWORKS FOR URBAN PLANNING

2.1 LEGAL FRAMEWORK

The current legal framework for urban planning in Afghanistan consists of a number of pieces of legislation, which were issued at different levels of the country's hierarchy of laws. The revision and consolidation of these pieces of legislation is warranted as many provisions contained in these pieces of legislation have become obsolete and inoperative. Urban planning functions are allocated amongst several agencies in an ambiguous and vague manner making it impractical for a coordinated urban planning in the country. The procedures for preparing, approving and revising development plans are not sufficiently defined. Enforcement of development plans and developments that do not conform to plans are not dealt with by the laws either.

The main pillar of the legal framework for urban planning is the *Law on Municipalities 1999*. A number of other pieces of legislation directly or indirectly affecting urban planning are also in existence. These pieces of legislation include: the *Expropriation Law 2000*, *Regulations on Urban Settlement Projects July 1979*; *Regulation for Sale and Distribution of Governmental Residential Apartments and Land in Kabul City, October 1980*; *Regulation on the implementation of the Master Plan, December 1990*; and *Order for Banning the Distribution of State Owned Land in Violation of City Master Plan 2002*.

The *Law on Municipalities* was enacted "to regulate the *modus operandi* of the municipalities and that of their respective district branches."¹ By far, this is the most controversial piece of legislation pertaining to urban planning and upon which far reaching urban planning functions are exercised. In regard to urban planning, the law focuses only - and in a sketchy manner - on who prepares/modifies, who approves, and who implements master plans.

Article 5(2) of the *Law on Municipalities* states that the design and modification of the Master Plan shall be the responsibility of the defunct Central Office of Architecture and Planning (now the Ministry of Urban Development Affairs (MUDA) in collaboration with its branch offices and municipalities. However, the law is vague with respect to preparing the master plan for Kabul; a municipality that enjoys a special status that is very different from the status of other municipalities in the country. Pursuant to Article 3 of the Law, unlike other provincial municipalities that operate as part of the local government, Kabul Municipality is part of the central government's organizational structure. According to the law and practice, the Kabul Mayor is appointed by the Head of State².

Aside from mandating MUDA to prepare master plans, as an agency of the central government, the law does not specifically mandate it to prepare national development plan for urban areas in Afghanistan. A

¹ Article 1, Law on Municipalities 2000.

² Article 6, Law on Municipalities 2000.

development plan so prepared would designate urban areas in the country for residential, industrial, recreational (including National Parks) and other classes of uses. These would include designation of conservation, environmentally sensitive and special areas.

Further, Article 5 of the *Law on Municipalities* provides that the master plans shall be implemented upon endorsement by the Council of Ministers and final approval of the Head of State. However, the Law does not go further to provide for the rules of implementation. In the case of Kabul City, to a certain extent, this gap is rectified by the *Regulation of Implementation of Kabul City Master Plan* (OG 794 Year 2000).

Distinct Legislative Treatment of Kabul City

As indicated earlier, pursuant to Article 3 of the Law, unlike other provincial municipalities that operate as part of the local government, Kabul Municipality is part of the central government's organizational structure. Accordingly, in relation to urban planning, the Regulation on Implementation of Kabul City Master Plan was issued to implement the Kabul Master Plan and regulate the conditions for constructing buildings, and [define] the responsibilities of individuals, institutions and the implementing unit of Kabul Master Plan (Article 1). In certain respects, the regulation can be characterized as forward looking. For example, Article 3 of the Regulation provides that "Kabul Master Plan, based on development and economic plan for the country, shall be implemented within 20 years in order to expand Kabul city in the future considering different factors such as growth of city population, planning structure, city transportation system, engineering networks, and industrial, residential and services centers."

However, the Regulation lacks consistency with the relevant primary laws of the country and incorporates vague and ambiguous provisions pertaining to urban planning. For instance, there has not been any legislative basis that provides for the formulation, contents, approval and revision of a national development plan, although the Regulations seem to envisage a plan akin to what could be loosely dubbed as a national urban development plan. The provision of the law that deals with revision of master plan is vague and ambiguous. According to the *Law on Municipalities* master plans for all municipalities have to be prepared and revised by MUDA. However, article 5 of the Regulations appears to imply – albeit in a vague manner - that Kabul Municipality may revise the city's master plan. Article 5 of the Regulations states that "modification of Kabul master plan may be carried out in urgent cases based on the request of Kabul master plan implementing unit, approval of council of ministers, and acceptance of Emirate authority (head of state)." The law does not provide any indication as to what situations would be regarded as "urgent cases."

Unlike the Law on Municipalities that focuses only on master plans, the Regulation envisages detail plans for different parts of the city to implement the master plan. However, understandably, there have not been detailed plans that were prepared by Kabul municipality in recent years. The focus of the municipality has been on the preparation and approval of master plan that can be responsive to the current needs and reality of Kabul. The law is silent on the preparation of detailed plans in cities other than Kabul.

Chapter 2 to Chapter 7 of the Regulations, which consist of 22 articles, deal with preconditions for designing urban projects, preconditions for constructing high rise buildings, preconditions for construction of social, cultural and services buildings, preconditions for constructing industrial buildings, and preconditions for constructing road, boulevards and parks.

Chapter 8 and chapter 9 deal with greenery and engineering networks respectively. Pursuant to article 29, land reclamation and greenery works shall be carried out based on approved plans. According to article 34, engineering networks must be designed in accordance with the master plan and by giving due consideration for the protection of the environment.

Chapter 10 of the Regulations provides for the responsibilities of Kabul Municipality in relation to urban planning. According to article 35, Kabul Municipality is responsible for the following functions:

1. Providing constructional maps for individuals and institutions;
2. Granting construction permit to individuals and institutions who have acquired land plots in the city;
3. Controlling the process of constructional work in the city, and monitoring its conformity with Kabul master plan;
4. Based on city the master plan, providing recommendations and guidance to institutions and individuals intending to design building and to individuals in the city;
5. Providing professional and technical help to relevant administrations in order to extend engineering networks, in accordance with Kabul city master plan.

Moreover, pursuant to article 37 of the Regulations, Kabul Municipality shoulders the responsibility to prevent unlawful buildings in Kabul. This provision is further emphasized by virtue of article 41, which provides that “Constructing buildings willfully within the scope of Kabul master plan is prohibited; in the case of violations, the violators will be punished according to *Sharia*.”

These provisions are clearly antiquated in the sense that they do not fully help the Municipality to rationally deal with the issue of non-conforming buildings including buildings that have been built in informal settlements across the city. The Regulations have not been implemented as intended, mainly due to the fact that it was overtaken by events that gave rise to the dramatic expansion of informal settlements in the city. They also need to be revamped in accordance with the Government’s land policy, especially the provisions dealing with upgrading of informal settlements.

The Regulations on Urban Housing Projects Under the 25-year Plan of Kabul City³ was also another legislation issued by the national Government in relation to Kabul city and urban planning. The stated objective of these Regulations is to regulate matters relating to housing of city inhabitants, implementation of detailed plans, and expanding of urban projects under the 25-year plan of Kabul city. Notwithstanding the Regulations’ stated purposes, most of the provisions embodied in the Regulations deal with matters pertaining to expropriation of immovable property.

According to article 2, the owner or the legal representative of the land or construction that is subject to expropriation shall be notified through mass media about the expropriation of the land or construction three months prior to implementation of the project. McAuslan succinctly describes the activity that takes place in relation to the land during the following three months as follows:

During the ensuing three months, there is considerable activity in relation to the land: officials visit to survey the land and explain to people in the area what is going to happen; persons from the area begin to make representations to the Mayor’s office; there may be some protests about the proposed expropriation and there will be discussions in the area. An important practice which necessarily is not provided for in the rules but is perfectly legal and commonsensical is that *before* any announcement is made of the need for expropriation, officials visit the area and assess land values. It is those land values that form the basis of compensation when an official announcement is made of the need for expropriation.⁴

In line with the provisions of the constitution of Afghanistan, article 3 provides that the expropriating authority shall pay fair compensation to the owner of the property or to his legal representative. Further, in conformity with the provisions of the *Constitution* and the *Expropriation Law*, the *Regulations on*

³ OG 794, 2000.

⁴ McAuslan, *Land Acquisition in Afghanistan*, (The World Bank: 2007) 35.

Urban Housing Projects Under the 25 Year plan of Kabul City provides that the expropriating authority shall only use the expropriated lands for “public purposes” as envisaged by a detailed plan.

Distribution and Sale of State Land in Urban Areas

The distribution and sale of state land for building residential houses, commercial and multi-stories buildings is governed by the *Presidential Decree on Distribution and Sale of State Owned Land for Residential, Commercial and High Rise Buildings in Kabul City*⁵. This decree was issued in 2002 with the stated objective of regulating the distribution and sale of state owned lands for building residential houses, commercial and multi-storied buildings in accordance with the Master Plan of the city.⁶ The decree provides for eligibility criteria for distribution and sale of state owned land for residential, commercial and high rise buildings in Kabul City. According to article 3, any person is eligible for distribution or sale of land in Kabul City unless his wife or his minor children own any residential house, apartment or parcel of land in Kabul city.

The Decree was meant to regulate how and where different classes of applicants should submit their applications for the purchase of land for a residential house.⁷ According to the Decree, civil servants may submit written applications for acquiring plot of land to their employer⁸ and other persons who do not hold official position may submit their applications to the relevant municipality⁹. In all cases, the Decree vests the power to finally determine the eligibility of applicants for plot of land in the Authorized Commission of Kabul Municipality¹⁰. However, as noted some years back in another report,¹¹ in practice, it appears that the Decree has not been in effect.

The *Order for Banning the Distribution of State Owned Land in Violation of City Master Plan 2002*¹² was issued with the objective of reinforcing the provisions of the *Presidential Decree on Distribution and Sale of State Owned Land for Residential, Commercial and High Rise Buildings in Kabul City*, which prevented municipalities from distributing state owned lands in violation of the master plan. Article 1 of the Decree states that “municipalities are prohibited from distributing state-owned lands for residential housing, commercial or other purposes in violation of the provisions of the *Regulations on Distribution of State Owned Land for Residential, Commercial and high Rise Buildings in Kabul City* which was published in the Official Gazette No 794 dated 25 September 2000.” Pursuant to Article 2 of the Order, whenever state-owned lands were alienated in violation of the master plan of the city, municipalities shall take prompt action to restore the land.

The modality envisaged by the Order reveals the gravity of the problem that the new Government was trying to address. The Order obliges security authorities to fully cooperate with the municipalities in implementing this Order. Although it appears that the Order is still observed by the Municipality, vast areas of land within the master plan continue to be grabbed by powerful elements in the society and used for residential housing, commercial and other purposes.

⁵ OG No 794, 2000.

⁶ Article 1.

⁷ Yohannes Gebremedhin, *Legal Issues Pertaining to Land Titling and Registration in Afghanistan*, (2006), (USAID/LTERA, Kabul), 7.

⁸ Article 4(1)

⁹ Article 4(2)

¹⁰ Article 6.

¹¹ Yohannes Gebremedhin, *supra* 8, 7.

¹² Order of His Excellency the President of Interim Administration of Afghanistan # 830, April 2002.

Expropriation of Land and Urban Development

In Afghanistan, expropriation of land for public purposes is viewed as a key legal tool for urban regeneration and development. The current *Expropriation Law* in Afghanistan¹³ provides the basic principle that land may be expropriated for “public purposes.” Pursuant to article 2 of the *Expropriation Law*, land may be expropriated upon the approval of the Council of Ministers and with prior payment of fair compensation.

The law provides for as to what constitutes “public purpose.” According to article 3(1) of the *Expropriation Law*, public purposes include the construction of industrial complexes, high ways, and oil and natural gas pipelines, the extension of telecommunication line, the laying of electricity lines, to build canals and other means of water supply, to build mosques and religious *madrassas*, and for the construction of other welfare foundations.” Article 3(2) and (3) also provide for additional purposes for expropriation. According to article 3(2), land may be expropriated “to extract from mines and underground resource deposits.” Further, sub-article 3 states that lands with cultural or scientific importance, agricultural lands, vast gardens and major vineyards, which have economic importance, and forest lands and lands found underneath dams may be expropriated in exceptional circumstances upon the approval of council of ministers, in accordance with *sharia*.

The *Expropriation Law* provides for the procedure for expropriating land. Pursuant to article 2, expropriation of land or a part of such land, which is needed for public purposes, must be carried out upon the approval of Council of Ministers, and with provision of prior and fair compensation determined based on the market value of the land. Pursuant to article 5, in order to determine the damages incurred due to land expropriation, a commission shall be formed by the Municipality, composed of the following members:

1. The owner or the user of the land, or his/her agent;
2. An authorized representative of the institution or administration for the needs of which the expropriation shall be carried out;
3. A representative of the district or municipality;
4. A representative from The Ministry of Finance;
5. A representative from the Department for Defending Emirates Property, Ministry of Justice.

Glaring deficiencies of this law have been identified in previous studies.¹⁴ McAuslan summarizes the deficiencies as follows:¹⁵

- there is no indication of the measure or quantum of compensation for land and buildings, what factors have to be taken into account or ignored or how compensation is to be assessed.
- there is no provision for a court to be involved in the process of expropriation as is specifically required by the Constitution

¹³ OG 794, 2000 and OG 894, 2005 respectively

¹⁴ McAuslan, *supra* 13; Foley, *supra*, 15.

¹⁵ McAuslan, *supra* 13.

- there is no provision for any appeal against the award of compensation as was provided by earlier compensation laws
- there is no provision for any disturbance compensation which is a standard head of compensation¹⁶
- there are no provisions on resettlement
- there are no basic provisions setting out powers and duties of officials and how these are to be exercised
- there are no provisions on how claims are to be made by PAPs or on any other matters affecting PAPs where they might be expected to have to take some action
- there are no provisions on how the land to be expropriated is to be delimited
- in terms of who is covered by the Law, references to ‘owners/users’ is very vague and unclear
- unlike earlier laws, there are no provisions for a plan to be made for the land prior to expropriation, or for the owner to be able to buy back his/her land if it’s not used for the purposes for which it has been expropriated.

The current land expropriation law and practice in Afghanistan appear to follow an aggressive approach to urban regeneration and development whereby, in the process, existing holders of property rights are forced to move away from areas where they have lived and sustained their families for a long time. While land expropriation is a common way of obtaining land for purposes of urban redevelopment, it is suggested that the law and practice be amended to provide due consideration of the property rights of those residents who get dispossessed and to put in place procedures based on the principles of fairness and justice.

2.2 POLICY FRAMEWORK

With respect to urban planning, the National Land Policy (NLP) of Afghanistan¹⁷ has adopted challenging and transformative policy approaches that recognize the needs of the urban majority and the importance of putting the rule of law at the forefront of any strategy for the development of the urban sector. In consideration of the later interest, the NLP promotes the principle that all land development must be carried out in accordance with plans designed by competent authorities. At the same time, however, to cater to the needs of the urban majority, the NLP adopts the concept of “upgrading” as a transformation tool in dealing with informal settlements.

The parts of the NLP that are relevant to urban planning are broad statements of general principles. These broad general principles were meant by the drafters of the Land Policy to serve as precursor to more

¹⁶ Disturbance compensation is compensation for the losses occasioned to the owner of acquired land as a consequence of being turned out of or ‘disturbed from’ his or her land: costs of moving, finding somewhere else to live or work from; loss of profits from a disturbed business. All these heads of compensation would fall within any resettlement plan but they are independent heads and should be payable irrespective of a resettlement plan.

¹⁷ The National Land Policy of Afghanistan was initially championed by the Ministries of Urban Development Affairs, Justice and Agriculture, Irrigation and Livestock and prepared by a Land Working Group consisting of representatives of governmental and non-governmental stakeholders. The National Land Policy was adopted by the Council of Ministers in 2007. For further discussion of the general context of the land policy’s formulation process, see Yohannes Gebremedhin, (2008), *The Challenges of Formulating A Land Policy in Post Conflict Context: The Case of Afghanistan*, Discussion Paper 4, Oslo Governance Center, UNDP.

detailed policy guidance on specific aspects of urban planning.¹⁸ The key policy statements pertaining to urban planning are:

- It is national policy that all land development be carried out in accordance with duly approved plans developed by competent authorities in consultation with local communities. Such plans shall consider both the current and future needs of communities. The Government shall promote the upgrading of informal settlements in tandem with progressive housing development.
- It is national policy that the government shall endeavor to upgrade the basic services of residential areas formed on public land occupied by homeless squatters on habitable land. The relevant municipality in consultation with the Ministry of Urban Development [Affairs] shall determine the habitability of an area taking into account clearly defined environmental and planning criteria and endeavor to integrate settlements formed on habitable land into the planning process of urban areas.
- It is a national policy that the Government gradually upgrades informal settlements formed on privately owned and environmentally tenable land as certified by the Ministry of Urban Development and relevant municipality and endeavor to integrate them into the formal planning processes of urban areas. The Government shall promote land tenure regularization in these areas in collaboration with relevant communities based on standards to be established by law.
- It is a national policy that the status and future plans of informal settlements formed on the surrounding areas of government approved boundaries of urban areas be determined by the ministries of agriculture and Urban Development [Affairs].

As intended during the NLP's formulation process, these policy statements have yet to be implemented through detailed policies on specific areas; enactment of necessary laws; and adjustment of practices that are congruent to these policies.

¹⁸ This statement is based on the Consultant's fir hand account of the intentions of those who participated in the formulation of the NLP as members of the ANDS Land Working Group, which the Consultant served as an international coordinator and adviser. .

3.0 GUIDING PRINCIPLES FOR DEVELOPING AN URBAN PLANNING LAW

Not all cities and urban areas everywhere are alike in terms of the reality on the ground. Therefore, there cannot and should not be a *one-size-fits-for-all* model urban planning law, although drawing comparative lessons from other countries legislative experiences might be desirable. The institutional reality, urbanization trends, the various types of settlements in urban areas including varying types of informal settlements, available resources for implementing development plans, and environmental issues are among the factors that ought to be seriously considered when suggesting or establishing guiding principles for developing urban planning law.

The guiding principles should aim at addressing the key institutional and legislative issues that have been impeding the preparation and implementation of development plans in urban areas. There are good indications that MUDA has been striving to move away from the physical planning approach to an integrated and strategic urban planning approach. Therefore, the following guiding principles are suggested with the objective of developing an urban planning law that would promote an integrated and strategic urban planning system and also prepared in a manner that it would be relevant in terms of appropriately governing the key issues of urban planning in the country. Further, the guiding principles for developing urban planning law must necessarily be done based on the existing reality of the urban areas of a given country. In connection to urban planning in Afghanistan, McAuslan aptly suggests that planning “must start from the reality of cities and towns as they are now rather than from an ideal blueprint – this includes both existing Master Plans and virtual reality New Towns”. Based on the reality on the ground and from the standpoint of comparative best practices, the following guiding principles are suggested for developing an appropriate legal framework for urban planning in Afghanistan.

3.1 ESTABLISH A TRANSPARENT AND PARTICIPATORY SYSTEM

The law must promote a transparent and participatory urban planning system to primarily deal with the longstanding institutional issues among urban planning agencies. The contents of the law must be clear, predictable and easily understood to all concerned. Since a transparent system presupposes partnerships between different agencies and various segments of the community, the law must embody provisions that are meant to ensure participatory planning process. Such participatory planning process must be ensured at two levels: 1) participation of the public/grass roots; 2) coordinated participation of relevant public entities and the private sector.

A participatory approach at the grass roots level would have several advantages. First, it would enable the designers of development plans to obtain a good grasp of the needs of the communities to be affected by development plans. Second, close consultation with the grass roots would facilitate any plan for spatial readjustment or relocation of housing with fair compensation that may become necessary to implement a development plan. An urban planning law that promotes a coordinated participation of relevant public

entities and the private sector would ensure an integrated development planning that aims to achieve appropriate distribution of economic activities and social welfare amongst regions.

3.2 ESTABLISH A SUSTAINABLE PLANNING SYSTEM

A sustainable planning system is essential to ensure that planning processes and decisions enable sustainable development. Sustainable development presupposes integrated approach to environmental, economic and social objectives, balances the needs of current and future generations. Put differently, any new/revised urban planning law should incorporate legal principles and rules that would promote prudent approach to planning decisions with limited adverse environmental or social impacts.

3.3 ESTABLISH A CONSISTENT SYSTEM

The practices and standards across the planning system ought to be commonly understood and observed. At present, the practices, concepts and standards are not commonly shared amongst the relevant players. For example, a basic notion such as “strategic plan” means different things for different relevant actors. A revised or new urban planning law should therefore aim to establish a consistent system to ensure a uniform approach and commonly understood standards of planning.

4.0 URBAN PLANNING RELATED LEGAL ISSUES: SUGGESTED GUIDELINES

As discussed earlier, the legal framework for urban planning in Afghanistan is not adequate. From a comparative law perspective as well as practical Afghan experience, the provisions of the laws that are directly or indirectly relevant to urban planning are notably sketchy. They are deficient in terms of following logical patterns of defining the institutions of planning and their functions; the types of plans that would be appropriate; the process of making, approving, and revising plans; implementation of plans; how to deal with non-conforming developments; and other general provisions that would be required to govern urban planning in a comprehensive and coherent manner. Enforcement of development plans and developments that do not conform to plans are not dealt with by the laws either.

Thus far the Government has resorted to an *ad hoc*, ‘fire-fighting’ approach to resolving the outstanding institutional and legal problems surrounding urban planning in Afghanistan. Almost all the measures have focused on institutional problems. There have been a series of administrative measures taken to resolve the overlapping functions between different institutions in respect of urban planning. However, the Government has not yet succeeded to effectively resolve the outstanding institutional issue through such partial and *ad hoc* administrative measures, which took the forms of memorandum of understanding between relevant institutions and Council of Ministers resolution.

Beyond such efforts, the government has yet to institute a coherent and comprehensive strategy to deal with urban planning related issues. Efforts geared towards a comprehensive and coherent strategy are required. However, such an objective would require substantial legal changes. This report therefore attempts to provide guidance for an approach that potentially has a good chance of being implemented in a phased manner in the context of existing institutions and by building on existing relevant laws and practices.

4.1 POSSIBLE IMMEDIATE ACTIONS

For the immediate future it is recommended that the Government should focus on the following measures that can be implemented quickly; promote stability in urban areas; and are not costly. These measures are of two types: 1) background actions that are meant to facilitate legislative stabilization to the outstanding urban planning issues and contribute to the long term resolution of legislative matters; and 2) measures which directly deal with legislative drafting.

4.1.1. Background Action: Establish the formation of an Inter-Institutional Commission

To ensure more coherence in approach than in the past, the Consultant proposes that the Government establish an Inter-Institutional Commission under the leadership of a Coordinator appointed by the

President with sufficient authority and professional competency to command adequate level of consistency and cooperation between the relevant public agencies involved in urban planning. Under the leadership of the Coordinator, the Commission will strive to:

- (i) Create an inventory of the national government and other government institutions' landholdings in urban areas. This should be done in collaboration with ARAZI and MUDA.
- (ii) Create an inventory of land grabbed by individuals or other entities. This activity will need to compile and build upon available data.
- (iii) Oversee and guide the drafting of a suitable urban planning law.
- (iv) Develop and propose for adoption regulations for quick development schemes outside the old master plan areas across the country.
- (v) Engage in consensus building activities in relation to the powers and responsibilities of relevant governmental entities and propose the substance of a legislative action to resolve outstanding institutional issues, especially those issues that exist between MUDA and Kabul Municipality.
- (vi) Develop a suitable strategy in respect of regularizing informal settlements in a holistic fashion. This strategy would have to propose a separate and appropriate/minimal level of planning standards to be applicable in informal settlements.

4.1.2. Legislative Action

To ensure more pragmatic and coherent approach than in the past, this report suggests that the required legal measures on urban planning in Afghanistan be categorized into three main interrelated objectives: 1) drafting a comprehensive urban planning law; 2) drafting and adopting enabling laws for immediate planning needs; and 3) establishing minimal planning standards for informal settlements. The following are the suggested guidelines on these three objectives.

1. Drafting a comprehensive urban planning law

a) Shift to Legislative Solutions

The existing legal framework for urban planning is inadequate to govern the extraordinarily complex urban situation stemming from decades of difficult history. The inadequacy of the legal framework has been one of the main factors responsible for the state of confusion which has generally characterized the urban planning situation in the country. According to MUDA, the priority needs for Afghan cities are: Urban master plans including reviewing of previous master plans to suit current demands; quick strategic urban development plans; detailed plans, clear planning guidelines (rules and regulations); and urban policies.

In response to these needs, MUDA has recently taken urban planning measures that include preparation of eight regional development plans, provincial urban development plans for six provinces and thirty three strategic city development plans. MUDA has also reviewed outdated master plans for five major cities including Mazar-i-Sharif, Kandahar, Herat, Jalalabad and Kunduz. Almost all these measures, however, were taken in the vacuum of enabling legislation. There are no legal provisions that govern the preparation,

contents and purposes of regional, provincial and strategic city development plans. The procedures for revision of outdated master plans are not clear either.

The range of recent efforts in relation to the legal aspects of urban planning has concentrated on resolving institutional issues. These efforts are well-intentioned, high-level administrative/political measures. However, these actions were apparently taken without taking into account the administrative feasibility of proceeding in such a fashion. Therefore, these administrative measures that were meant to ensure the reassigning of responsibilities in respect of urban planning have not been implemented and the problem remains outstanding like other key legal issues discussed in this report.

In view of the foregoing considerations, with respect to the legal problems surrounding urban planning in Afghanistan, it would be desirable to shift from the partial and administrative/political solution to providing legislative solutions. The shift from partial and administrative solution to legislative solutions would involve first the consolidation of the existing relevant provisions embodied in various legislation discussed in this report and revise and build on them as appropriate.

b) Proposed Modality for Drafting of Revised Urban Planning Law

The Inter-Institutional Commission should include, as a part of its tasks, activities aimed at consolidating and revising the existing legal framework for urban planning. Given the sketchy nature of the existing legal framework, this task will likely involve the drafting of a new urban planning law that builds on the existing relevant provisions and practices. Since the interpretations and perspectives of MUDA, the Municipalities and GDMA on the processes of preparing and revising development plans are likely to be affected by the adoption of a revised legal framework, it is advisable that the drafting work be conducted in close cooperation with these concerned agencies.

Under the general guidance of the recommended Inter-Institutional Commission, it is suggested that the drafting work be carried out by an experienced lawyer (legislative drafter) who should work in collaboration with a Legal Working Group to be composed of three to five lawyers from MUDA, Kabul Municipality and GDMA. The principal drafter should bring to the drafting work not only expertise and experience in drafting and urban planning law, but also a fresh perspective that will lend the revised law the required objectivity. While the principal drafter would assume the ultimate responsibility for drafting the revised urban planning law, he or she should draw directly on the experience of the members of the Legal Working Group as well as urban planners and other relevant officials and advisers from MUDA, Kabul Municipality, and other municipalities across the nation and GDMA.

The Legal Working Group should be constituted and start its work as soon as possible. The Legal Working Group should work under the guidance of the proposed Inter-Institutional Commission and its primary function should be to provide advices and local insights to the principal drafter as well as comment on earlier drafts shared by the primary drafter. The principal drafter in collaboration with the Legal Working Group should aim to complete the drafting work within a period of two months.

c) Responsibilities of the Principal Drafter and the Legal Working Group: Suggested Guidelines

As noted in a previous report by this Consultant, “in dealing with the gaps and deficiencies in the existing legal framework, all efforts must be made to avoid unduly relying on foreign legal principles and laws as well as any current national legal provisions that are not relevant for the current reality.”¹⁹ However, to

¹⁹ Yohannes Gebremedhin (2012), *The Legal Aspects of Urban Planning in Afghanistan*, LARA/USAID: Kabul, 36.

ensure a good chance of effective implementation, as indicated earlier, a new draft urban planning law should build on the provisions of the existing legal framework and practices that are relevant and useful for the current reality. In filling the gap and rectifying deficiencies in the existing legal framework, it would also be desirable to draw lessons from comparative best practices.

Based on the above premises, the following guidelines are suggested for the works of the principal drafter and the Legal Working Group:

(i) Identification of deficiencies and gaps in the relevant legal framework

A previous report prepared by this Consultant²⁰ has attempted to identify the main gaps and deficiencies in the existing legal framework for urban planning in Afghanistan. The first task of the principal drafter, in consultation with the legal Working Group, should be to review this report and hold further consultations with MUDA, Municipalities' and GDMA officials and advisers and determine the gaps and deficiencies in the legal framework.

(ii) Identification of overlapping institutional functions

This task of the principal drafter – with the collaboration of the Legal Working Group – is a task that can and should be undertaken in ancillary manner as they undertake their activity in relation to identification of deficiencies and gaps in the legal framework for urban planning. The principal drafter, in collaboration with the Legal Working Group, should review the analysis, discussions and recommendations on the institutional arrangement for urban planning which are contained in the previous report on the legal aspects of urban planning prepared by this Consultant. At the same time, the principal drafter, in collaboration with the Legal Working Group, should review available administrative as well as legal documents including relevant council of resolution, memorandum of understanding, and presidential decree and other pertinent legislation.

Like most of the key legal issues pertaining to urban planning, the issue of institutional arrangement involves policy issues. It is thus suggested that every step down the drafting road, especially when dealing with issues such as institutional responsibilities, the principal drafter and the Legal Working Group hold consultations with MUDA, Kabul Municipality, and GDMA officials. Such consultation must be undertaken with the aim of trying to obtain guidance and also to understand and consider the perspectives of the relevant government officials in determining suitable institutional arrangement for urban planning.

4.2 ENABLING LEGISLATION FOR QUICK URBAN DEVELOPMENT SCHEMES

It is highly desirable and recommended that a coherent and comprehensive urban planning law be developed and adopted soon. However, to accomplish this will require substantial legal change for which building sufficient consensus among relevant institutions is likely to take significant time. Efforts in this direction are required to begin in earnest immediately, but so are immediate legislative measures to address the growing crisis of informal urban development that is often accompanied by massive land grabbing and unlawful occupation of public land. Thus, although this Consultant's recommendation is catered towards working for a comprehensive urban planning law, at the same time, it is recommended that an enabling legislation for quick urban development schemes be developed and adopted immediately.

²⁰ Id.

The recommended legislation for quick urban development schemes should empower MUDA and the municipalities in the designation of several types of special planning areas for the purposes of implementing projects concerning protection, regeneration, intensive development, and public and/or private investments. MUDA in collaboration with the municipalities should be authorized to determine the location and size of areas for such operations, prepare plans and projects.

The proposed legislation should also allow the possibility that a municipality and the majority of the property owners in an area could form partnerships for the redevelopment and/or joint management of the area based on clear standards to be issued by MUDA. In addition to physical operations of development, such standards should be envisaged to regulate matters pertaining to funding, management, ownership and means of socio-economic development.

4.1.3. The basic tenets of the scheme: Suggested guidelines

1. Purpose

The purpose of a quick urban development scheme should be to effect rapid development of the land for particular housing development, township, industrial, commercial or service functions. Such a scheme should be put into effect if and when the pertinent authorities intend to implement a plan to stimulate development and encourage investment by granting a specified planning permission in a specific area. It may as well be triggered if and when the Government plans to generate private sector interest in an area. Such a private sector interest would include the establishment of industrial parks or large housing development project.

2. Making of A quick Urban Planning Scheme

It is suggested that a quick urban planning scheme should be made by MUDA in consultation with the relevant municipality or municipalities. MUDA may also direct a municipality to prepare and submit to it for approval a quick urban planning scheme within a given timeframe.

3. Contents of a quick urban planning scheme

A quick urban planning scheme is envisaged to be prepared based on simplified planning standards. Accordingly, it is suggested that a quick urban planning scheme should consist of a map and a written statement and such diagrams, illustrations and descriptive matter as MUDA deems fit for a given development area and purpose. Besides the scheme should specify:

- (i) The development or classes of development permitted by the scheme;
- (ii) The land in relation to which permission is granted; and
- (iii) Any condition, limitation or exception subject to which a development permit is granted.

Drafting a quick urban planning scheme legislation: Suggested guidelines

Given the much narrower scope of this suggested legislation, under the general guidance of the proposed Inter-Institutional Commission, it is suggested that the drafting work be carried out by the principal drafter mentioned above in relation to drafting an urban planning law. Considering the interrelationship of the issues involved, the principal drafter should simultaneously work on the two draft legislation. As suggested in relation to drafting the urban planning law, the principal drafter should draft the legislation for the quick urban planning scheme in collaboration with the proposed Legal Working Group.

The principal drafter should assume the ultimate responsibility for drafting the revised urban planning law. However, he or she should draw directly on the experience of the members of the Legal Working Group as well as urban planners and other relevant officials and advisers from MUDA, Kabul Municipality, and other municipalities across the nation and GDMA.

The principal drafter in collaboration with the Legal Working Group should aim to complete the drafting work within a period of 4 to 6 weeks.

4.3 MINIMAL PLANNING STANDARDS FOR INFORMAL SETTLEMENTS

The existing legal framework pertaining to urban planning does not reflect the existing reality associated with informal settlements. There are no provisions guiding the pertinent authorities in terms of bringing informal settlements into the formal planning process. However, The National Land Policy that was adopted in 2007 embodies provisions dealing with informal settlements. These aspects of the National Land Policy provide guidance to endeavor incorporating informal settlements into the planning processes of urban areas.

The adoption of the National Land Policy constitutes an important development in terms of enhancement of property rights through regularization schemes as well as appropriate level and type of planning for informal settlements. Over the last seven years, donor initiated projects on informal settlements focused on modest level of upgrading of basic services such as footpaths, roads and drainages and clarification of property rights. Most of the regularization or upgrading processes have not been complemented by any spatial realignment or any level of planning process. Lack of enabling law has been one of the constraints in this regard.

However, in a limited way, some informal settlements property regularization or upgrading efforts have envisaged in their plans an integrated approach to tenure regularization that combines tenure security with improvement of basic services and some sort of neighborhood planning processes. Under such initiatives, typically, project adjudication teams and surveyors have worked with community members to define the boundaries of parcels and establish cadastral plans, design access roads and utility rights of way as needed, and attempted to facilitate the issuance of titles or leases to legitimate right holders.

4.1.4. Possible legislative Actions: Suggested guidelines

The following is a list of the general recommendations from which the guidelines provided in relation to the question of planning and informal settlements derives: 1) Background actions that are meant to promote a holistic approach to dealing with informal settlements and contribute to viable long-term resolution of the problems of informal settlements; 2) Specific actions to promote minimal planning standards in informal settlements.

1. Background Action

The “background actions” presuppose the adoption of the principle that the different aspects of the issue of informal settlements i.e. the questions of tenure insecurity, lack (or inadequate) basic services and the need for spatial readjustment (or minimal planning process) ought to be dealt with in an integrated manner. To implement an integrated regularization schemes, putting an enabling legislation for systematic land regularization in place is imperative. Although the questions of tenure security and basic services in informal settlements fall outside the scope of this report, the following guidelines are suggested in consideration of their relevance to the subject at hand:

(i) Separating the question of adjudication and regularization from planning standards

It is essential that a law and regulations are issued to govern the implementations of informal settlement regularizations schemes. Such a law and regulations would, among other things, govern the preparation of a draft scheme of regularization; community and public authorities' partnership in the process of preparing regularization scheme; the modality of approval and declaration of regularization scheme and implementation of a scheme of regularization. Although a holistic approach is recommended in dealing with informal settlements, for the purposes of effective administration of legal provisions, it is suggested that the planning aspect of the issue of informal settlement dealt with by an urban planning legislation.²¹

2. Informal settlements and planning issues: Suggested Guidelines

(i) Make planning an integral part of regularization scheme

As indicated earlier, the question of planning in informal settlements ought to be considered in tandem with the question of regularization of property rights in such settlements. It may be argued that linking tenure regularization with any level of planning with the aim of improving basic services would make the objectives of tenure regularization agenda too difficult to achieve. Such an argument is usually based on the premise that dealing with tenure issue separately at the initial stage of regularization will not hamper any future effort to upgrade unplanned settlements in a planned fashion. However, in line with comparative best practices, it is contended that unplanned settlements should be subjected to an appropriate level of planning process before property rights are regularized. This is premised on the argument that once the specifics and legal status of the regularized plots of land and the individual holders of rights to land is ascertained, negotiation for spatial readjustment becomes onerous. Such an approach would also facilitate to bring informal settlements in the larger planning process of the concerned city.

An appropriate level of spatial readjustment based on neighborhood or community development plan ought to be an essential component of any regularization scheme. The level of such a need for spatial readjustment may vary from one situation of unplanned settlement to the other. A revised or new urban planning law should consider incorporating a provision that provides as to how and when the state may realign land for purposes of compliance with zoned use or for the better planning and layout of the land. The revised or new law should also seek to promote coordinated working relationship between the relevant municipality (and its district office), and the concerned community in relation to any minimal planning standards that may be required to apply in any unplanned area declared for regularization scheme.

(ii) Conceptualizing minimal planning standards

A revised or new urban planning law should consider incorporating provisions that promote minimal planning standards to declared regularization areas. This means, the legal amendments should aim at preserving existing layout in unplanned areas, unless there are compelling interests that warrant planning alterations to the existing layout. Such compelling reasons would include creating adequate vehicular access to parcels, either by establishing a new road, right of way, or widening an existing road.

(iii) Exclusion from land planning control provisions

²¹ The USAID LARA Project is currently developing a model for land rights regularization in informal settlements in tandem with prioritized upgrading activities.

In accordance with the National Land Policy, a revised or new law should incorporate a provision that strikes a balance between promoting necessary spatial readjustment to improve access roads and the need to do so with no or minimal social or livelihood disruption in the areas selected for regularization. To this effect, a revised or new urban planning law should realistically deal with enforcement of land planning control, thereby excluding unplanned areas on which a scheme of regularization is declared from the existing enforcement of land planning control provisions.

5.0 KEY SUBSTANTIVE LEGAL ISSUES: SUGGESTED GUIDELINES

5.1 OBJECTIVES OF URBAN PLANNING LAW

The purpose of any given legislation should be determined by carefully considering the very nature of the issues involved in the subject of the specific domain of the law. There is no law that explicitly provides for the objectives of the urban planning provisions that are found scattered in various laws. The objective of the existing legal framework can however be gleaned from the relevant provisions of the different legislation. Close examination of these provisions reveals that urban planning law in Afghanistan has the primary objective of serving as a tool to control urban development in accordance with a master plan, which usually is a graphic representation of the planners' vision for the future land use plan of a given city.

Considering the nature of the issues relating to urban planning, the purpose of an urban planning law should be viewed as much broader than a means of controlling urban development in accordance with a master plan and detailed plans. It is therefore suggested that the law should have the following purposes:

- 1) To establish appropriate processes and institutions to achieve effective planning and development;
- 2) To determine the powers and responsibilities of the relevant government agencies and facilitate coordinated work relationship between these agencies;
- 3) To protect public interest in the processes of planning and development;
- 4) To promote for the orderly, equitable and economic use and development of land;
- 5) To promote environmentally sustainable urban development; and
- 6) To allow appropriate level of private sector participation in planning and development.

5.2 INSTITUTIONAL ARRANGEMENT FOR URBAN PLANNING

The current institutional structure for urban planning is characterized by ambiguity and overlap of functions between MUDA and municipalities, particularly Kabul Municipality. According to the existing legal framework, the key institutions of urban planning are the Ministry of Urban Development Affairs (MUDA), and municipalities including Kabul municipality, which enjoys a special status.²² According to

²² Pursuant to the Law on Municipalities 2000, the powers and responsibilities of preparing and modifying urban plans were originally vested in the Office of Architecture and Planning. These responsibilities were later on administratively brought within the mandate of MUDA, which is the successor Ministry to the Office of Architecture and Planning.

the *Law on Municipalities*, MUDA's responsibility with respect to urban planning is to prepare master plans to be considered for adoption by the Council of Ministers. These plans are finally submitted for final approval (signing) by the Head of State. The *Law on Municipalities* provides that MUDA shall prepare master plans in consultation with concerned municipalities.

The drafting of a revised or new urban planning law should consider the diverging views that exist on how to move forward with the current institutional set up in terms of preparing, approving, revising and implementing development plans. The two diverging views can be broadly categorized as two options that are: (1) in favor of maintaining the status quo; and (2) in favor of reforming the current institutional arrangement. According to the first option, MUDA would continue with preparing development plans, save for detailed plans; and the municipalities would continue to be responsible for implementing development plans. The second option would be to reform the status quo. As an agency of the central Government MUDA would primarily focus on establishing a national urban development plan, which provide policies, strategies, goals and objectives through which economic growth, social development and environmental sustainability in relation to urban planning can be achieved nationwide. It is suggested that the primary drafter and the proposed Legal Working Group should consider the pros and cons for the two options. The readily notable pros and cons for the two options are outlined as follows.

The pros and cons of maintaining the status quo –

The advantages of maintaining the status quo are: 1) the relevant planning agencies would continue conducting their functions within familiar working arrangement; 2) the system would continue utilizing the readily available experiences and expertise (capacity) that exist within MUDA; 3) prevent disruption or confusion that a transition from a centralized to decentralized planning process may entail.

The two glaring disadvantages of maintain the status quo are: 1) leaves lingering institutional issues emanating from overlapping responsibilities legislatively unresolved; 2) does not encourage municipalities to build planning and implementation capacity.

The pros and cons of reforming the existing system -

The main advantage of reforming the existing system would be to better utilize resources that can be found at the municipality level and encourage municipalities to build planning and implementation capacities. Moreover, a decentralized planning arrangement offers better opportunity for participatory process both at the grass roots level and the central government agencies level.

There are several disadvantages of reforming the existing planning system. The often mentioned disadvantage pertains to the question of capacity at the municipalities' level. Most municipalities in Afghanistan lack the necessary in-house capacity to prepare master plan and detailed plans. The second disadvantage may be the potential for confusion or disruption of the planning process at the transitional stage.

In accordance with the ANDS, it is suggested that the reformed system should seek to promote a decentralized planning process whereby municipalities are encouraged to build their planning capacity and mandated to prepare their own master plan and detailed plans in accordance with the national and regional development plans. To achieve a decentralized planning process, it is suggested that MUDA be responsible for preparing National Development Plan and Regional Plans and the municipalities to be responsible for preparing Master Plans and Detailed Plans. This means, as indicated earlier, as an agency of the central Government MUDA should primarily focus on establishing a national urban development plan, which provide policies, strategies, goals and objectives through which economic growth, social development and environmental sustainability in relation to urban planning can be achieved nationwide.

5.3 TYPES OF DEVELOPMENT PLAN

With respect to the types of development plan, there are discrepancies between the law and the practice. The *Law on Municipalities 2000* provides for only one type of development plan, i.e. master plan. The Law does not provide for any other type of development plan such as National Development Plan, Regional Plan and Detailed Plan. From the standpoint of clarity and comprehensiveness, the provisions dealing with master plan are too sketchy that they leave the procedure and essence of the development plan ungoverned and unclear. The provisions dealing with the master plan do not provide the nature of the plans, their content and their purpose either.

The Detailed Plan is also recognized by the *Regulation on Implementation of Kabul City Master Plan*. However, the Regulations do not provide the nature of the plans, their content and purpose. It is not also clearly provided as to who is mandated to design the Detailed Plans, although there has not been any practical issue between Kabul Municipality and MUDA. The general understanding is that the municipality has the mandate to prepare its detailed plans as part of its responsibility to implement the master plan. There has not been any consensus as to who should prepare Detailed Plans of other cities.

However, the prevailing practice in relation to development plans has surpassed the provisions of the relevant legal framework. In the prevailing legislative vacuum, in addition to master plans, MUDA has taken the initiative to prepare regional and provincial plans. This clearly has created a discrepancy between the law and practice. As indicated earlier, there are no legal provisions that govern the preparation, approval, and revision of Regional and Provincial Plans.

It is recommended that the principal drafter and the Legal Working Group consider the following two differing approaches on how to deal with the discrepancy between the law and the practice. The first option would be to strictly adhere to the existing laws. However, this approach would not help in rationally moving forward the urban planning situation in a desirable direction. Adhering to the existing laws would leave all outstanding issues in relation to preparation and revision of development plans unresolved. The second option would be to reform the existing legal framework by taking into account the current practice as well as comparative best practices.

Reforming the current legal framework for urban planning should aim to: 1) adjust to prevailing practice in terms of preparing regional/provincial plans; 2) ensure a holistic or strategic planning process as opposed to land use planning process envisaged by the current legal framework; and 3) ensure participatory urban planning process at all levels. A strategic planning process can be facilitated by reforming the law to provide for the preparation of a national development plan. The main objective of strategic planning is to serve as a policy tool to address the distribution of economic activity and social welfare between amongst regions.

It is recommended revising the law to adjust to the prevailing practice and in conformity with best practices from other countries with comparable urban situations. In tune with best practices, there is a need to redefine the different levels of plans together with the accompanying roles and responsibilities of respective national and local agencies. Accordingly, it is recommended that the law provides for four types of development plans: 1) the national development plan, 2) regional/provincial plan, 3) master plan, and 4) the detailed plan.

Moreover, the draft law should clearly provide the purpose and contents of all types of plans. For example, the law may provide to the effect that the National Development Plan shall provide the policies, strategies, goals and objectives through which economic growth, social development and environmental sustainability in relation to urban planning can be achieved nationwide. Further, the law may provide to the effect that the National Development Plan shall contain policies, plans, guidelines with mechanisms for their implementation. This plan shall prevail over any other planning instrument to the extent of any inconsistency.

5.4 PROCEDURE FOR PREPARING DEVELOPMENT PLANS

The procedural steps for preparing, revising and approving master plans are given in a very generalized manner. The relevant laws do not envisage meaningful collaborative efforts between the different planning agencies. Moreover, as indicated earlier, the legal framework does not embody any principle that aims to lead the country towards a decentralized urban planning process, as envisaged by the Afghan National Development Strategy in regard to the urban sector.

There is a need to legislatively establish principles that will lead the country towards a decentralized urban planning process. At the same time, however, the law should attempt to strike a balance between the dictates of decentralization and the reality on the ground in relation to the local authorities' limited capacity in terms of preparing their own urban plans, including Master Plans and Detailed Plans. To address the often-mentioned capacity constraints at the municipality level, the new draft law should embody provisions that promote complementary working relationships between the central agency and the provincial administrations in terms of preparing master plans and detailed plans, and in the process building capacity at the municipality level. In addition, a revised or new urban planning law may provide that the municipalities shall have the mandate to outsource their planning functions to the private sector.

Therefore, any new draft law should clearly define the roles and responsibilities of MUDA and municipalities, in accordance with the Afghan National Development Strategy (ANDS) with respect to decentralization, and in a way that legitimate capacity concerns are addressed appropriately. Having said this, devolution of urban planning responsibilities should be viewed as the ultimate objective of a process that will form a realistically crafted working partnership between MUDA as national agency and municipalities as local authorities. Thus, the new law should promote the objective that all the partners will work together to steadily build their respective capacities.

Essentially, the role of MUDA should be to define the broad outlines of a national development strategy (in the form of a national urban development plan), undertake a capital investment plan necessary to implement it, and provide local authorities with coherent guidelines to ensure that national objectives are adhered to. The process that must be developed should ensure that local conditions and aspirations are reflected in national guidelines while allowing maximum local autonomy in their implementation. Indeed, the enforcement of development regulations can be successful only with a convergence of national and local objectives. Towards this end, good coordination and transparency in the decision making process is required at both the national and municipality levels.

5.5 REVISING DEVELOPMENT PLANS

The current legal framework does not embody provisions that clearly deal with the revision of development plans. While the *Law on Municipalities* is silent on revising any development plan, the *Regulation on Implementation of Kabul City Master Plan* incorporates a provision on this issue. According to article 5 of the *Regulation on Implementation of Kabul City Master Plan*, “in urgent cases, revision of the Kabul Master Plan may be carried out based on the request of the Implementing Unit of Kabul Master Plan and the approval of the Council of Ministers and the Head of State.” This provision is vague as to which public agency should carry out the revision of master plan under such circumstances. Moreover, the Regulation does not give any clue as to what would amount to an “urgent case”.

Therefore, the legal framework should be revised to incorporate clear provisions on revision of development plans. The law should clearly provide who should revise any development plan and under what circumstance. Moreover, the concerned planning authority (MUDA or the Municipalities) should be required keep any approved development plan including regional plan, master plan or detailed plan under periodic review and make such minor and necessary updating to any of these plans so as to ensure that the plans continue to provide a sound basis for the development of the planning area for which it was made. In addition, the new or revised law should prescribe a reasonable period within which the pertinent

planning authority must revise the approved plan or such part thereof, which, in the opinion of the planning authority requires updating. In determining whether an approved master plan or detailed plan or any part thereof requires updating or revision, the revised law should require the planning authority to consider –

- (i) any significant change in Government policy that renders any policy or proposal in an approved master plan or detailed plan out of date or otherwise unnecessary or undesirable to pursue;
- (ii) the extent to which the development that has taken place since the approved master plan or detailed plan was first prepared complies with or departs from such plan;
- (iii) in any case, where any development that has occurred represents a departure from the approved master plan or detailed plan, the extent and type of such development that has taken place; where it has taken place; and its effect on the economy, the environment and social development of the local planning area;
- (iv) whether there is any significant pressure for development within the local planning area and if so, for what kind of development;
- (v) any development and pressure for development in areas contiguous to the local planning area; and
- (vi) the views of the community representatives in the local planning areas on the need for, or desirability of a revised development plan.

6.0 CONCLUSIONS

An essential prerequisite for revising or drafting a new urban planning law is a thorough legal analysis of the various aspects of the law and practice in a given jurisdiction. Only such an analysis can identify the practical impediments as well as the gaps and deficiencies in the legal framework. Proper analysis of the gaps and deficiencies in the law and practice is required in order to put a suitable legal framework for urban planning. Such a legal analysis should also identify the key issues that must be resolved legislatively.

The existing legal framework represents a bundle of impediments that must be overcome, if the design of an efficient urban planning system in the country is to materialize successfully. The solution to the bundle of impediments can be found through a rigorous analysis of the many important issues and legal provisions that are embodied in a number of legislation that are relevant for urban planning in Afghanistan.

The earlier Recommendations Report prepared by the Consultant provides this analysis.

It is upon this analysis, and further analysis of related policy issues, that the practical guidance on urban planning and outstanding legislative issues are based. With due attention to the recommendations on key legislative issues and suggested guidelines set forth in this report, it should be possible to put a suitable legal framework for urban planning in Afghanistan in a phased manner and with a minimum of difficulties due to legal and institutional impediments that would otherwise occur.

The suggestions and recommendations set forth above should be carefully examined by all governmental stakeholders. Among those that deserve priority attention are the following:

(i) Establish the formation of an Inter-Institutional Commission

To ensure more coherence in approach than in the past, it is recommended that the Government establish an Inter-Institutional Commission under the leadership of a Coordinator appointed by the President with sufficient authority and professional competency to command adequate level of consistency and cooperation between the relevant public agencies involved in urban planning.

(ii) Categories of legislative measures

To ensure more pragmatic and coherent approach than in the past, this report suggests that the required legal measures on urban planning in Afghanistan be categorized into three main interrelated objectives: 1) drafting a comprehensive urban planning law; 2) drafting and adopting enabling laws for immediate planning needs; and 3) establishing minimal planning standards for informal settlements.

(iii) Shifting from administrative to legislative solution

With respect to the legal problems surrounding urban planning in Afghanistan, it would be desirable to shift from the partial and administrative/political solution to providing legislative solutions. The shift from partial and administrative solution to a legislative one would involve first the consolidation of the existing relevant provisions embodied in various legislation discussed in this report and revise and build on them as appropriate.

(iv) Drafting modality

Under the general guidance of the recommended Inter-Institutional Commission, it is suggested that the drafting work be carried out by an experienced lawyer (legislative drafter) who should work in collaboration with a Legal Working Group to be composed of three to five lawyers from MUDA, Kabul Municipality and GDMA.

(v) Addressing gaps and deficiencies in the existing legal framework

In dealing with the gaps and deficiencies in the existing legal framework, all efforts must be made to avoid unduly relying on foreign legal principles and laws as well as any current national legal provisions that are not relevant for the current reality. However, to ensure a good chance of effective implementation, a new draft urban planning law should build on the provisions of the existing legal framework and practices that are relevant and useful for the current reality. In filling the gap and rectifying deficiencies in the existing legal framework, it would also be desirable to draw lessons from comparative best practices.

(vi) Resolving overlapping institutional functions

Like most of the key legal issues pertaining to urban planning, the issue of institutional arrangement involves policy issues. It is thus suggested that every step down the drafting road, especially when dealing with issues such as institutional responsibilities, the principal drafter and the Legal Working Group hold consultations with MUDA, Kabul Municipality, and GDMA officials. Such consultation must be undertaken with the aim of trying to obtain guidance and also to understand and consider the perspectives of the relevant government officials in determining suitable institutional arrangement for urban planning.

(vii) Enabling legislation for quick urban development schemes

This Consultant's recommendation is mainly catered towards working for a comprehensive urban planning law. However, at the same time, it is recommended that an enabling legislation for quick urban development schemes be developed and adopted immediately. The purpose of a quick urban development scheme should be to effect rapid development of the land for particular housing development, township, industrial, commercial or service functions. A quick urban planning scheme is envisaged to be prepared based on simplified planning standards.

(viii) Governing planning in informal settlements

It is essential that a law and regulations are issued to govern the implementations of informal settlement regularizations schemes. Such a law and regulations would, inter alia, govern the preparation of a draft scheme of regularization; community and public authorities' partnership in the process of preparing regularization scheme; the modality of approval and declaration of regularization scheme and implementation of a scheme of regularization. Although a holistic approach is recommended in dealing with informal settlements, for the purposes of effective administration of legal provisions, it is suggested that the planning aspect of the issue of informal settlement dealt with by an urban planning legislation.

(ix) Minimal planning standards

A revised or new urban planning law should consider incorporating provisions that promote minimal planning standards to declared regularization areas. This means, the legal amendments should aim at preserving existing layout in unplanned areas, unless there are compelling interests that warrant planning alterations to the existing layout. Such compelling reasons would include creating adequate vehicular access to parcels, either by establishing a new road, right of way, or widening an existing road.

7.0 REFERENCES

Foley Conor, “A Guide to Property Law in Afghanistan”, NRC: Kabul, 2006.

Gebremedhin Yohannes, “Legal Issues in Afghanistan Land Titling and Registration”,
USAID/LTERA, July 2005

Gebremedhin Yohannes, “Preliminary Assessment of Informal Settlements in Kabul” Kabul:
USAID/LTERA. 2006.

Gebremedhin, Yohannes, “The Challenges of Formulating A Land Policy in Post Conflict Context: The
Case of Afghanistan”, Discussion Paper 4, Oslo Governance Center, UNDP, 2008.

ICMA, *Municipal Governance in Afghanistan*, USAID, 2010 (2 voll.);

Land Reform in Afghanistan (LARA), “*Institutional Assessment*”, 2012 (unpublished).

McAuslan Patrick, “Municipal Law in the Islamic Republic of Afghanistan: Issues and Options Paper”,
UNHABITAT, 2005.

McAuslan Patrick, “Urban Land Issues and Options Paper”, UNHABITAT, 2005.

McAuslan Patrick, “Land Acquisition in Afghanistan: A Report, The World Bank, 2007

Ministry of Urban Development Affairs, “Draft Upgrading Policy – including revisions by KURP”, 2011.

UMC/ICMA, “Manual on Urban Planning – Afghanistan Municipal Strengthening Program”, 2008;

U.S. Agency for International Development

1300 Pennsylvania Avenue, NW

Washington, DC 20523

Tel: (202) 712-0000

Fax: (202) 216-3524

www.usaid.gov